Whistleblower Litigation
ALI-ABA: Advanced Employment Law and Litigation - 2012

Debra S. Katz[1]

Katz, Marshall & Banks, LLP
1718 Connecticut Ave. NW
Sixth Floor
Washington, D.C. 200099
(202) 299-1140
www.kmblegal.com
katz@kmblegal.com

[1] Debra S. Katz is a founding partner with Katz, Marshall & Banks, LLP, a civil rights firm based in Washington, D.C., that specializes in the representation of plaintiffs in employment law, whistleblower, civil rights and civil liberties matters. Alexis H. Ronickher and Julie Zibulsky, who assisted with the research and writing of this chapter, are associates with the Firm.

U.S.C.A. §2409(c)(1)(B). Additionally, a successful claimant may obtain reasonable attorneys' fees and expenses, including expert witness fees. 10 U.S.C.A. §2409(c)(1)(C).

VI. FALSE CLAIMS ACT WHISTLEBLOWER PROTECTIONS

The False Claims Act ("FCA") is a law intended to provide an incentive to private citizens to file claims on behalf of the Federal Government for making fraudulent claims against the government. See 31 U.S.C. §§ 3729 - 3733. Successful claimants under the FCA receive a portion of the recovery, often approximately 15-25%, with the remainder going to the government. See 31 U.S.C.A. § 3730(d). The Dodd-Frank Act also strengthened the FCA and created new whistleblower protections and incentive programs to reward individuals who report violations of the law that result in monetary sanctions against the offending party.

Under the FCA, a person is liable for a fine and treble damages if that person:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

29 U.S.C.A. § 3729(a)(1)(A) – (G).

An employee who participates in an FCA action is protected under the act's whistleblower protection provisions. See 31 U.S.C. § 3730(h). The law protects employees from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer" because the employee has sought to stop an employer from engaging in any of the acts that would violate 31 U.S.C. § 3729(a)(1). Id. Employees engage in protected activity when they meet the "distinct possibility" standard under which protected activity occurs when an employee's opposition to fraud takes place in a context where "litigation is a distinct possibility, when the conduct reasonably could lead to a viable FCA action, or when…litigation is a reasonable possibility." Mann v. Heckler & Koch Defense, Inc., 2010 WL 5262729, at *3 (4th Cir. 2010); Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 869 (4th Cir.1999).

Section 1079(b) of the Dodd-Frank Act contains significant changes to the anti-retaliation provisions of the FCA regarding the scope of activity protected from retaliation. First, Section 1079(b) of the Dodd-Frank Act amends the FCA by expanding the concept of protected activity to include "lawful acts done by the employee, contractor, or agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of [the False Claims Act]." As a result, 31 U.S.C. § 3730(h) now encompasses a broader range of activities that could further a potential qui tam action or could halt a violation of the FCA, including protections against associational discrimination. Second, Section 1079(b)(1)(c) amends the FCA to remove the statutory language of ''agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter'' and instead inserts ''agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." This new statutory language should increase both the scope of protected activity and the class of individuals protected under the FCA's anti-retaliation provision, but the extent to which the courts are willing to interpret this amended language remains to be seen.

To prove that an employer retaliated against an employee in violation of 31 U.S.C. § 3730(h), an employee must demonstrate that: (1) she engaged in protected activity; and (2) that she was discriminated against because of her protected activity. See U.S. ex rel. Hefner v. Hackensack Univ. Med. Ctr., 495 F.3d 103, 111 (3d Cir. 2007); see also Bell v. Dean, 2010 WL 2976752 (M.D. Ala. July 27, 2010) (plaintiff's explicit threats to report unauthorized use of funds, in conjunction with documents evidencing that defendants had submitted false claims to the government qualified as protected activity); U.S. ex rel Cooper v. Gentiva Health Servs., Inc., 2003 WL 22495607 (W.D. Pa. 2003) (denying summary judgment on FCA retaliation claim where plaintiff successfully pled he engaged in protected activity where he internally complained of the employer's fraudulent conduct). To demonstrate that she was discriminated against "because of" conduct in furtherance of a False Claims Act suit, an employee must show that her employer had knowledge of the protected activity and that her employer's retaliation was

motivated, at least in part, by the employee's engaging in protected activity. See Hefner, 495 F.3d at 111.

The United States District Court for the Southern District of West Virginia recently held that investigatory efforts, short of filing suit, constitute protected activity for the purposes of the anti-retaliation provision. Williams v. Basic Contracting Servs., Inc., 2010 WL 3244888 (S.D. W.Va. Aug. 17, 2010). The court noted that the plaintiff had not filed a qui tam suit, but had located a copy of the defendant's government contract and spoken to people regarding alleged fraudulent billing practices. The court held that this was sufficient to constitute protected activity under the anti-retaliation provision.

The employee may bring her whistleblower claim in federal district court. 31 U.S.C.A. § 3730(h)(2). Section 1049(b) of the Dodd-Frank Act amends the FCA to provide that an employee may bring a civil action under the FCA against a retaliatory employer up to three years after the date of the retaliation. See 31 U.S.C.A. § 3730(h)(2). This amendment provides much-needed clarity, in light of a recent Supreme Court decision that required plaintiffs to engage in the uncertain task of identifying and applying the most analogous state-law statute of limitations to FCA retaliation claims. See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409 (2005) (holding that the FCA's six-year statute of limitations did not govern FCA civil actions for retaliation). However, this amendment does not explicitly apply retroactively to cases filed prior to the Dodd-Frank Act, thus, for those cases, courts continue to apply a state-law analogue's statute of limitations. See, e.g., Riddle v. Dyncorp International, Inc., No. 11-10155 (slip op.) (5th Cir. Jan. 5, 2012) (reversing the district court's dismissal because the lower court was incorrect to apply the Texas Whistleblower's 90-day statute of limitations and should have instead applied the two year statute of limitations applicable to personal injury claims, which the Fifth Circuit found more analogous to FCA claims); Saunders v. District of Columbia, 789 F. Supp. 2d 48 (D.D.C. 2011) (holding that a three year statute of limitations applies because both the FCA and the analogous District of Columbia False Claims Act both have three year statutes of limitations, and indicating but not deciding that the amendment should apply retroactively).

In the very recent case of Harrington v. Aggregate Industries-Northeast Region, Inc., No. 11-1511 (1st Cir. Feb. 7, 2012), the First Circuit reversed the district court's grant of summary judgment to defendant in plaintiff's FCA retaliation case. The decision provides a thorough analysis of what is required for a plaintiff to state a prima facie case under the anti-retaliation provisions of the FCA and holds, for the first time at the appellate level, that the McDonnell Douglas framework, borrowed from Title VII, applies to FCA retaliation cases.

Aggregate supplied concrete for the "Big Dig" highway project in Boston. Joseph Harrington, Plaintiff-Appellant and other employees brought a qui tam action against Aggregate, alleging that Aggregate often substituted substandard material in violation of its contract specifications. The qui tam action was filed in June 2005 under seal, naming Aggregate and

several subsidiaries as defendants. Harrington kept working at Aggregate. In March 2007, Aggregate management learned the identities of the relators, including Harrington. Following this, the qui tam, which settled for several million dollars. The appellant received a percentage of this settlement as a relator. A few days after signing the qui tam settlement agreement, Aggregate terminated him. Id. at 2-4.

Harrington and his co-relator sued Aggregate. The district court granted summary judgment as to Harrington on the basis that appellant had failed to present evidence of a causal connection between his role as relator and Aggregate's decision to terminate his employment. Id. at 6.

As a matter of first impression at the appellate level, the First Circuit Court of Appeals held that the McDonnell Douglas burden-shifting framework is the appropriate framework for retaliation suits brought under the FCA where there is no direct evidence of retaliation. The court found that the fact that Aggregate management learned that Harrington was a relator in March 2007 and then discharged him seventy-two hours after he signed the qui tam settlement was sufficient to state a prima facie case of retaliation. Id. at 9-11.

The court rejected Aggregate's contention that appellant failed to show knowledge that any on-site managers learned of his status and stated, "To clear the low bar required to establish a prima facie case, the fact that high-level Aggregate executives learned of the appellant's whistleblowing several months before suffices to show knowledge." Id. at 11. The court likewise refuted defendants' argument that Harrington did not engage in protected activity because executing a settlement agreement is not conduct in furtherance of an FCA action. The defendants pointed to an earlier First Circuit case that delineated what sort of pre-litigation activity might qualify for protection under the anti-retaliation provisions. This reasoning, the court explained, was inapposite to Harrington's situation. Harrington was a relator in a the qui tam action when it was resolved and his "execution of the settlement agreement was surely conduct in furtherance of that action." Id. at 12-13.

Aggregate also argued that plaintiff had not showed causation because there was a four month gap between management learning that Harrington was a relator and his firing. However, the court explained that the appropriate time span to look at – from the time of his signing the settlement agreement until the time he was fired – was sufficiently brief, only 72 hours. The court pointed out that if Aggregate had terminated plaintiff before the settlement, it would have made settlement more difficult to reach. Id. at 13-14.

Finally, the court held that although Aggregate had put forth a legitimate non-retaliatory reason for terminating plaintiff – his refusal to submit to a second drug test – "the facts underlying Aggregate's efforts to force a drug test on appellant, along with the temporal proximity between the time that he signed the settlement agreement and the time of his dismissal, create a trial-worthy issue about whether Aggregate's proferred reason for firing him was a

sham." In so holding, it again reiterated the close temporal proximity and pointed out that there was doubt that Aggregate followed its own drug testing protocol. Id. at 14-19.

Some recent district court decisions have clarified what types of claims can form the basis of an FCA retaliation claim. The United States District Court for the District of Massachusetts recently held that kickbacks and off-label promotions can predicate an FCA whistleblower retaliation claim. U.S. ex rel. Gobble v. Forest Labs, Inc., 2010 WL 2933925 (D. Mass. July 23, 2010). The defendants moved to dismiss, arguing that the relator had not engaged in protected activity because the basis of relator's complaint was non-compliance with laws governing pharmaceutical sales. The court rejected his contention and also held that the relator's complaints to his supervisor were sufficient to put defendants on notice of his protected conduct.

In Gordon v. ArmorGroup, NA, 2010 WL 3418219 (E.D. Va. Aug. 27, 2010), the court held that a plaintiff an alleged constructive discharge can form the basis of an FCA claim. The plaintiff, a former director of operations for a U.S. security service overseas, brought suit against three private security providers, one of their managers, and another individual alleging that the defendant's violation the anti-retaliation provision of the FCA and Virginia state law by constructively discharging him after he engaged in protected activity. Although the court dismissed plaintiff's state law claims, finding that at-will employees cannot be constructively discharged under Virginia law, it allowed his FCA claims to move forward on the basis of the same alleged constructive discharge.

The remedies available to a successful claimant are generally designed to "make the employee whole." 31 U.S.C. § 3730(h). Remedies include reinstatement with seniority, double back pay with interest, and special damages including attorneys' fees. Id.

VII. OTHER STATUTORY WHISTLEBLOWER PROTECTIONS

The following list includes other statutory whistleblower protections and a brief description of their coverage:

1. **Section 11(c) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 660(c)**: Protects employees from discharge or discrimination based on instigation of or participation in a proceeding against his or her employer for occupational hazards prohibited by the act. The employee must file a complaint with OSHA within 30 days of the retaliation.

2. **The Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105**: Provides protection for employees of commercial motor vehicles to report noncompliance with safety, health, or security regulations. The employee must file a complaint with OSHA within 180 days.